

A17-1423
STATE OF MINNESOTA
IN SUPREME COURT



STATE OF MINNESOTA

Respondent,

vs.

ANTHONY JOHN SAWINA

Petitioner.

RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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ATTORNEYS FOR RESPONDENT

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA:

Respondent respectfully requests that this Court deny review of the unanimous, unpublished decision of the Court of Appeals, Judges Larkin, Johnson, and Smith. *State v. Sawina*, No. A17-1423, 2018 WL 6442049 (Minn. Ct. App. Dec. 10, 2018).

I. LEGAL ISSUE

Has Sawina established that it is plain error to apply the doctrine of transferred intent in an attempted murder case?

Sawina did not raise this issue in the district court. While defense counsel objected to the timing of the district court's jury instruction on transferred intent, defense counsel agreed that the instruction was accurate and never argued that transferred intent could not apply to attempted murders.

The court of appeals determined that the district court properly exercised its discretion in giving the instruction in response to the jury's question.

II. STATEMENT OF FACTS

A complete statement of the facts, along with citations to the record, is contained in Respondent's brief in the Court of Appeals. Facts relevant to the petition for review are described below.

III. REASONS FOR DENYING REVIEW

Sawina asks this Court to decide an issue that was never raised in the district court. Sawina makes assertions that are not supported by the record, and his arguments are contrary to well-established authority. For all of these reasons, this Court should deny Sawina's petition for review.

A. Background Information

Sawina pointed his gun at five men after making racially charged comments, threatened to kill all five men, fired multiple shots at the three men (H.G., A.A. and A.H.) remaining in the car as it was attempting to leave, and struck two of the men (H.G. and A.A.) with bullets. The amended complaint charged Sawina with four counts of attempted murder (first and second-degree) of H.G., A.A., “or another.”¹

The elements of attempted first-degree murder include attempting to cause the death of a human being with premeditation and intent “to effect the death of the person or another.” *See* Minn. Stat. § 609.185(a)(1). The elements of attempted second-degree murder include attempting to cause the death of a human being with intent “to effect the death of that person or another.” *See* Minn. Stat. § 609.19, subd. 1(1).

Consistent with these statutes, the district court instructed the jury that Counts I and III required the State to prove that Sawina attempted to cause the death of H.G. “or another person.” The court instructed the jury that Counts II and IV required the State to prove that Sawina attempted to cause the death of A.A. “or another person.” Sawina did not object to these instructions.

The prosecutor argued in closing that Sawina threatened to kill all of the occupants of the car. He described how the evidence established Sawina pointed the gun at driver A.H. because the bullet struck the windshield where A.H.’s head would have been if he had not been ducking. The prosecutor explained to the jury

¹ The State also charged Sawina for five counts of assault, one count for each victim.

that the instructions for attempted murder applied to H.G. and A.A., but the instructions also said, “or another person.” The prosecutor continued, “So even if you believe that he’s trying to kill [A.H.] and then he shoots at the other people, it’s satisfied.” Sawina did not object to these statements.

After starting deliberations, the jury asked, “if we decide” that Sawina is guilty of attempted murder “of one other person, i.e., not [H.G. or A.A.], do we find him guilty of both Counts I and II or just I or II.” The jury posed the same question with respect to Counts III and IV.

Citing a number of cases, the district court indicated that it was inclined to provide the jury with a transferred-intent instruction. Defense counsel objected, arguing that the State had an opportunity to request this instruction previously and that the jury had not been able to consider this instruction when it started deliberating. The court asked defense counsel if he disagreed that the instruction was an accurate representation of the law. Defense counsel responded:

[Defense counsel]: No. I’m familiar with the transfer of intent instruction. I don’t know if it’s verbatim the same, but I’m saying if the Court says it, it is. But that’s not my concern. I guess I’m more concerned that this was a question that had come in earlier, within the first few hours of deliberation, but my biggest concern is given how long they’ve had this case, how long they’ve been reading the instructions without this to be considered along with the other instructions, I still object.

I don’t object to the content in terms of the accuracy, but I object to giving them any additional instructions, whether it’s from the JIG or not.

Defense counsel continued, “[T]he transferred-intent concept is incorporated into the murder charges that were read to the jury.”

The court instructed the jury as follows:

Transferred intent allows evidence of an attempt to harm someone to transfer to the person actually harmed when there is a possibility the person harmed was not the intended recipient of the specific act. If the defendant acted with premeditation and with the intent to cause the death of a person, the elements of premeditation and intent are [sic] to kill are satisfied and may be transferred to another victim, even if the defendant did not intend to harm the other person. This concept is known as transferred intent.

If the defendant acted with the intent to cause the death of a person, the elements of intent to kill are satisfied and may be transferred to the other victim, even if the defendant did not intend to kill the other person. This concept is known as transferred intent.

The jury found Sawina guilty of all nine counts. In his direct appeal, Sawina argued that the district court’s transferred-intent instruction was erroneous for two reasons, neither of which were raised by the defense at trial. One of those reasons – his claim that doctrine of transferred intent should not apply to attempted murder – is the basis for his petition for review.

The State responded that plain-error analysis should apply because Sawina had not raised this argument below (State’s Br. 29-35). The court of appeals held that the district court did not abuse its discretion in instructing the jury on transferred

intent; the court of appeals did not address the State’s plain-error argument.² The court of appeals cited several Minnesota appellate court decisions applying the doctrine of transferred intent to attempted murders.

B. Sawina Has Not Established A Basis For This Court To Grant Review.

Sawina incorrectly asserts that “[t]his case is the perfect vehicle for addressing this important issue” (PFR 10). This case does not warrant review for several reasons. First, Sawina neglects to mention that the argument he makes now – that transferred intent does not apply to attempted murders – was not raised below. Therefore, the plain-error standard of review applies.³

Second, Minnesota appellate courts have already determined that the doctrine of transferred intent applies to attempted murders. *E.g., State v. Ford*, 539

² The State submits this response in opposition to Sawina’s request for review of the court of appeals decision. Should this Court grant Sawina’s petition for review, however, the State will continue to argue that the plain-error standard of review applies. In light of this Court’s recent order in *Bilbro v. State*, A17-1566 (12/11/18 Order), which struck a portion of the State’s brief for raising an argument it raised in the postconviction court and court of appeals but did not cross-petition on, it is unclear what procedure the State should follow when the court of appeals rules in the State’s favor but does not follow the same analysis as the State. The State maintains that Minn. R. Crim. P. 29.04, subd. 6 permits the State “without filing a cross-petition, to defend a decision or judgment on any ground that the law and record permit that would not expand the relief that has been granted to the party.” *See also State v. Grunig*, 660 N.W.2d 123 (Minn. 2003). If this Court disagrees, Respondent respectfully requests that this response be treated as a Response and Request for Cross-Review under Minn. R. Civ. App. P. 117, subd. 4.

³ Sawina’s argument would be quickly disposed of under the second prong of the *Griller* plain-error test. Because Sawina cannot cite any controlling authority rejecting the doctrine of transferred intent for attempted murder, he could not prevail on his claim of error. *Cf. State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006) (holding that the supplemental instruction was not plainly erroneous where defendant failed to cite any authority demonstrating that it was erroneous).

N.W.2d 214, 229 (Minn. 1995) (“Ford's attempted murder conviction involves the doctrine of transferred intent”); *State v. Bakdash*, 830 N.W.2d 906, 915 (Minn. App. 2013), *rev. denied* (Minn. Aug. 6, 2013) (upholding murder and attempted murder convictions on theory of transferred intent, rejecting defendant’s challenge to the transferred-intent jury instruction, and stating that under Minnesota caselaw defendant’s “intent to hit someone with his vehicle is transferred to unintended victims who were hit and either injured or killed”).

This Court has also explained that the murder statutes actually incorporate the doctrine of transferred intent. *State v. Cruz-Ramirez*, 771 N.W.2d 497, 506–07 (Minn. 2009) (“Minnesota's homicide statutes, including premeditated murder, incorporate the doctrine of transferred intent. . . . That doctrine, derived from the common law, stands for the principle that a defendant may be convicted if it is proved he intended to injure one person but actually harmed another”) (internal citation and quotations omitted). *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008) (affirming first-degree murder conviction based on transferred-intent doctrine). In this case, consistent with the murder statutes, the court instructed the jury that it should consider whether Sawina attempted to murder the named victims “or another.” For Sawina’s claim to prevail, this Court would have to eliminate the “of another” language from the murder statutes in attempt cases. Sawina provides no authority for that, nor does he claim that the district court’s instructions on the elements of murder, incorporating transferred intent, were improper.

In *State v. Livingston*, 420 N.W.2d 223, 229-30 (Minn. 1988), this Court rejected an argument similar to the one Sawina makes now. This Court affirmed convictions for assaults where the defendant ordered his dog to attack a different victim. This Court rejected defendant's claim that transferred intent could not be applied to the non-intended victims, explaining that defendant's argument:

would allow one who threw a bomb into a crowd of people to escape criminal liability for harm to injured persons except one when he can persuade a factfinder that he only intended to harm one particular person. The same would hold true for any dangerous instrumentality which, by its nature, causes harm to more than one person.

Id. at 230. Sawina offers no basis for this Court to overturn this well-established caselaw.

Third, Sawina makes factual claims throughout his petition that are not supported by the record. He repeatedly asserts that the "jury concluded" Sawina intended to kill the driver of the car, not the passengers. While the jury asked a hypothetical question about what to do if it found Sawina did not intend to kill the two men he shot, this question does not indicate that the jury concluded Sawina only intended to kill the driver. The jury found Sawina guilty of all counts; the evidence that Sawina intended to kill the occupants of the car was strong where he accurately fired inside the car, struck two of the three people with bullets, narrowly missed the third person, and threatened to kill all of them. And even assuming the jury concluded that Sawina intended to murder only the driver when he shot the other

two victims in the car, his attempted murder convictions were proper under well-established caselaw.

CONCLUSION

Respondent respectfully requests that this Court deny the petition.

DATED: January 2, 2018

Respectfully submitted,

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**CERTIFICATION OF RESPONSE
LENGTH**

vs.

Anthony John Sawina,

Petitioner.

I hereby certify that this Response in Opposition to Petition for Review conforms to the requirements of Minn. R. Crim. P. 29.04. The length of this brief is 1,989 words. This brief was prepared using Microsoft Office 2016, Times New Roman font face size 13.

Dated: January 2, 2019

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